Abstract

The most important task of any tribunal is to make sure justice triumphs. The court of law faces innumerable obstacles in accomplishing its duty. However, it is always challenged by the uniqueness and complications that each and every case carries with it. One particular issue that has been very ambiguous and challenging to tackle is the fitness of the Accused to stand trial. Many times this aspect has been raised by a lot of defendants either because of a serious consideration of their health that is not allowing them to conveniently stand the trial or simply just to delay the proceedings or try to acquire the sympathy of the tribunal to avoid prosecution. The international tribunals have certainly helped to put an end to impunity, but have had to deal with situations where the fitness of the accused has changed the whole complexion of a case. Most of the defendants have claimed to be suffering from mental disorders such as Schizophrenia and Dementia, hindering them from participating in the trial since they lose sanity and do not remember facts. The ECCC is currently handling one case involving the fitness of a defendant. While the case has been put on hold as the defendant has been ordered to receive treatment, uncertainties are plaguing around the outcome of the case as to whether the tribunal will wait for her to recover to continue the proceedings, if there is any hope or will she be kept in detention with medical supervision or released provisionally. Though each case is unique, the ICTY has dealt with similar scenarios where the fitness of its defendants was evoked. Whether the fate of the on-going case at the ECCC will meet the same end as those in ICTY since it is also under the same jurisprudence, or whether the defendant will be granted provisional release, is a matter that the ECCC is still trying to figure out.

Keywords: Defendant, fitness, trial, release, justice

Fitness to Stand Trial

The prime task of any tribunal is to make sure that justice prevails. The court of law faces innumerable obstacles in accomplishing its duty. But through a very well structured framework where there is an extricate link that correlates the technical staffs, legal officers, judges and prosecutors, the proceedings are rendered as efficient and timely as possible and verdicts as accurate and satisfactory as they can be. However, no matter how competitive a tribunal can be, it is always challenged by the uniqueness and complications that each and every case carries with it. Whilst there is a legal approach to every distinct scenario that unfolds during the course of a trial, we draw a very thin line between what is lawfully binding and whether decisions pronounced really reflects a fair and equitable procedure, at least in the eyes of the victims.

We are living in an era where leaders who were found guilty of atrocities such as genocides and exterminations, and grave breaches of human rights under the International Covenant on Civil and Political Rights, the Rome Statute and the 1949 Geneva Conventions[1], are now being held rightfully accountable for their obstreperous and despicable deeds through highly specialised *ad-hoc* International Tribunals designed with expertise of international standards. The world has witnessed a lot miseries and its history has been forever tainted with bloodsheds and spiteful acts of national proportions, albeit the World-Wars and Cold War periods. Over the past decade, following the Nuremberg and Tokyo trials, the international law community has achieved milestones through the setting up of the International Criminal Tribunal for the former Yugoslavia (ICTY), Special Court for Sierra Leone (SCSL), International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC) and the Extra Ordinary Chambers in the Court of Cambodia (ECCC) in a bid to eradicate impunity that leaders responsible of awful crimes thought it would have lasted eternally.

The tribunals have accomplished remarkable tasks so far and have managed to overcome a lot of obstacles, which at a time were regarded as high mountains to climb. Each tribunal has had to face distinct hurdles, considering the wide disparity and specific nature of

[1]Includes wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian the rights of fair and regular trial, unlawful deportation or unlawful confinement of a civilian

each caseload they have had to handle. Every problem or uncertainty encountered have been tactfully dealt with and thereto any new circumstances that arose huge question marks, were similarly addressed by enforcing existing laws, adding new rules and making relevant modifications to agreements, unanimously with the approval of the Security Council and/or the General Assembly of the United Nations, and the judiciary body involved.

In this paper we will focus on one of the most sensitive and complicated issues that most of the International Tribunals have had to deal with, when the defendant lawyer evokes the fitness of his client to stand trial, which very often has resulted into the case being discharged or deferred until the accused shows signs of improvement and is deemed fit again to face the proceedings, which normally represents a very thin probability to happen and eventually the case maintains status quo.

The most recent case involving this ambiguous scenario is the case 002/2 that is under proceedings in the Extraordinary Chambers in the Courts of Cambodia. This International (or rather hybrid) Tribunal which has been exclusively established in Cambodia on the request of the Royal Government of Cambodia to prosecute senior leaders of Democratic Kampuchea who have been totally responsible for the dreadful period in the history of Cambodia between 17 April 1975 to 6 January 1979, a very sinister phase which led to the death of around 1.7 million Cambodians during which they endured inhumane and outrageous conditions afflicted onto them, is currently hoping to finalise the second caseload, but is still probing into how to proceed, as one of the four accused has been declared unfit to stand trial.

Ieng Thirith, who was well known as Minister of Social Affairs in Democratic Kampuchea and has remained with the Khmer Rouge until 1998, was placed in pre-trial detention by the ECCC in November 2007 after she was alleged to be directly responsible for having planned, instigated, and ordered the commission of crimes against humanity[2] and genocide, by killing and starving to death Cambodians accused of anti-Khmer Rouge and agents of foreign governments, and by killing members of the Vietnamese community, which constitute grave breaches of the Geneva Conventions of 1949.

[2]Murder, extermination, enslavement, deportation, imprisonment, torture, persecution on political and racial grounds, and other inhumane acts and also persecution on racial grounds

Mrs Ieng has been known for her fiery temper, but her behaviour apparently became much more turbulent during the course of the trial at the ECCC and in some hearings; it even fluctuated between aggression and confusion, and sometimes, disinterested silence which led her defence team to claim that she had to have serious problems with her mental health. Those concerns become more evident as they were emphasized as being an inherited family trait, since her elder sister is widely believed to have suffered from schizophrenia. Eventually on 17 November 2011, the Trial Chamber issued its decision on Ieng Thirith's fitness to stand trial indicating that the she was currently unfit to stand trial as she had been diagnosed as suffering from a progressive and degenerative illness. The Trial Chamber had recourse to general provisions of international criminal and human rights law[3] and keeping in mind that the interpretation most favourable to the accused must be preferred[4], and "liberty is considered the norm" and "detention is an extraordinary measure,"[5]unanimously considered it to be in the interests of justice to sever the charges against Ieng Thirith in Case 002[6].

However following the co-prosecutors appeal against her unconditional release, the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC) pronounced its decision by discarding the stay of release. Furthermore, the Supreme Court Chamber also found that the Trial Chamber must exhaust all available measures potentially capable of helping the accused to become fit to stand trial. Such decision was adopted in the light of the possibility, albeit slight, of a meaningful improvement in the mental health of the accused which was foreseen by the medical experts appointed by the Trial Chamber. In a situation where the stay of proceedings may be lifted, the Supreme Court Chamber found that unconditional release of an accused is not required. The Supreme Court Chamber concluded that the original ground for keeping the accused in provisional detention, namely to ensure her presence during the proceedings, remains valid and relevant. The Supreme Court Chamber directed the Trial Chamber to request, in consultation with appropriate medical and psychiatric experts, additional treatment for the accused which may help

[3] Impugned Decision para.79, Decision on immediate Appeal against the Trial Chamber`s order to release the Accused Ieng Thirith
[4]Impugned Decision, para. 80, Decision on immediate Appeal against the Trial Chamber`s order to release the Accused Ieng Thirith
[5] Ibid.

[6] Pursuant to Internal Rule 89*ter of the ECCC*

improve her mental health to such extent that she can become fit to stand trial. Such treatment is to be carried out in a hospital or other appropriate facility in Cambodia. No later than six months after the commencement of this treatment, the accused shall undergo a medical, psychiatric and/or psychological expert examination, after which the Trial Chamber shall determine the fitness of the accused to stand trial without delay. The Supreme Court Chamber also stated that the detention of the accused shall be carried out in the ECCC detention facility until the necessary arrangements for the additional treatment are finalized and that all the medical expenses are to be borne by the ECCC.

This decision of the Supreme Court Chamber has been the result of extensive considerations of all possible sources of law applicable to the ECCC and the jurisprudence that extends to the use of that of the ICTY, ICTR, ICSL and ICC as well, since the agreement on the law of the ECCC between the Royal Government of Cambodia and the Security Council of the United Nations[7] and the Internal Rules of the ECCC fall short of addressing fitness to stand trial of the accused.

As conformed as this decision is to the jurisprudence of the ECCC and standards of the international law, it has to be noted that reference was taken from previous decisions delivered on cases related to the fitness to stand trial of the accused even though that those cases are very distinct on their own, considering the conditions of the accused and circumstances of the trials.

For example, in Stanišić and Simatović case, the Appeals Chamber of the ICTY granted the request by the Defence for Jovica Stanišić to adjourn the trial for a minimum of three months and to reassess his state of health before determining when the trial should commence[8]. The Trial Chamber then provisionally released the accused with conditions, including that the accused be taken to a hospital in Belgrade, and, if necessary, admitted for treatment under conditions which may have included "admission to a secure or closed section of said hospital." Alternatively, in the event that Stanišić was not admitted to a hospital, he was to report at the police station on a daily basis.[9]

[7] See Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea.

[8] Prosecutor v. Jovica Stanišić and Franko Simatović, IT-03-69-AR73.2- "Decision on Defence Appeal of the Decision on Future Course of Proceedings", App. Ch, 16 May 2008, para. 22

[9] Prosecutor v. Jovica Stanišić and Franko Simatović, IT-03-69-PT, "Decision on Provisional Release", T. Ch.3, 26 May 2008, para. 68(1)(d)(13-(114), affirmed on

Similarly, in the case of Vladimir Kovačević [10], Trial Chamber I at the ICTY suspended the proceedings for six months and ordered the accused` s provisional release subject to specified conditions such as: the accused shall submit to treatment in the mental health facility in the Republic of Serbia and Montenegro determined by its Government and the accused shall not leave the premises of the mental health facility, unless this is part of his treatment and only after receiving the consent of the Chamber[...][11]

Also, in the Radoslav Brđanin and Momir Talić [12] case, Talić was suffering from an incurable and inoperable locally advanced carcinoma with an unfavourable prognosis of survival even on short term. Trial Chamber II ordered Talić to be provisionally released, subject to "stringent conditions," on humanitarian grounds, namely, his ill-health. His "release" was effected directly into the custody of Yugoslav officials and then into a form of a house arrest. Clearly, the term release used by the ICTY did not mean freeing the accused, but rather was a technical term denoting termination of detention under the jurisdiction of the ICTY and relinquishing control over the accused in favour of Yugoslav authorities who had furnished guarantees of continued control.

It must be pointed out that "provisional release" is a term of art which denotes the ceasing of detention by the ICTY in favour of a detention-type measure to be implemented outside the jurisdiction of the ICTY.

Addressing the fitness to stand trial of an accused redefines the whole dimension in the outcome of a particular case as a medical condition is not something that can be predicted and eventually

appeal, IT-03-69-AR6S,4, "Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115", App.Ch., 26 June 2008.

[10] Prosecutor v. Vladimir Kovačević, IT-o1-42/2-1, "Public Version of the Decision on Accused`s Fitness to Enter a Plea and Stand Trial",T.Ch.1,12 April2006； Vladimir Kovačević

[11] Prosecutor v. Vladimir Kovačević, IT-01-42/2-1- "Decision on Provisional Release", T.Ch. I,2 June 2004, p.3 only 22 months later, the Trial Chamber I found that Kovačević "does not have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings against him should his mental health condition change." (IT-01-42/2-I, public version of the "Decision on Accused's Fitness to Enter a Plea and Stand Trial", T. Ch. I, 12 April 2006, p.12). Subsequently, the Trial Chamber I rejected the Defence motion to dismiss the indictment. (IT-01-42/2-I- "Decision on Defence Motion to Dismiss the Indictment", T.Ch. I, 1 September 2006), and IT-01-42/2-I, "Decision on Decision on Defence Request for Certification for Interlocutory Appeal of "Decision on Defence Motion to Dismiss the Indictment" from 1st September 2006", 27 September 2006 (denying request for certification to appeal the decision denying the Defence motion to dismiss the indictment). The case was ultimately referred to the authorities of the Republic of Serbia (IT-01-42/2-I, "Decision on Appeal against Decision on Referral under Rule 11*bis*", App. Ch. 28 March 2007).

[12] Prosecutor v.Radoslav Brđanin and Momir Talić, IT-99-36-T, "Decision on the Motion for Provisional Release of the Accused Momir Talić, T.Ch2,20 para. 35

requires the advices and evaluations of a panel of medical experts who needs to examine the health issues of the defendant.

Admittedly raising issues concerning the fitness of an accused can be a very shrewd strategy to escape trial or delay proceedings, as it has been the case of Rudolf Hess[13], a high profile Nazi[14] figure indicted in the International Military Tribunal, where he admitted he was feigning to be suffering from amnesia after physicians claiming that he was sane despite some memory losses due to hysteria. Or, fitness to stand trial can be a necessity owing to natural and genuine manifestation of a disability or medical constraint, as outlined in another case at the International Military Tribunal, where accused Krupp von Bohlen[15] who suffered a debilitating stroke in 1941 leaving him bed-ridden and partially paralyzed, was not only confirmed as mentally incompetent to stand trial, without the capacity for memory, reasoning or understanding of statements made to him, but was also opined by US military physicians that he could not be transported to the Tribunal for trial without endangering his life.

As a matter of fact, fitness to stand trial depends not only on the physical conditions[16] of the accused that can hinder him/her from taking part in the proceedings, but also on the mental ability of the accused to carry out a defence at any given time during the proceedings before a verdict is pronounced or to give directions to the counsel to do so, and more specifically to be able to understand the nature or object of the proceedings, the possible consequences of the proceedings, or interact with his respective counsel(s) and is not solely based on the presence of a mental sickness unless it can be demonstrated that the mental ailment is having severe repercussions on the defendant`s performance on adjudicating process (RoeschR&Golding SL, 1980).In case there are claims that the accused is not fit to stand trial, most of which are due to some kind of psychotic disorders such as schizophrenia or memory loss-associated illnesses, if not physically related, the court has to take appropriate measures so that it operates in a fair and expeditious manner by protecting the rights of the accused[17]and make sure that

[13] http://www.historyplace.com/worldwar2/biographies/apr-hess-cal.htm
[14] The Nazi Holocaust-its History and Meaning-Ronnie S. Landau
[15] https://www.jewishvirtuallibrary.org/jsource/Holocaust/Krupp.html

[16] *Case No. ICTR-98-41-T, Bagosora et al.*, Decision on Nsengiyumva Motion for Adjournment Due to Illness of the Accused, 17 November 2006 (hereinafter the "Decision"), para. 8.
[17] Article 35(new) in the Law on the establishment of the Extra-ordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea.
International Covenant on Civil and Political Rights (ICCPR) 1976 article 14.

the maxim of the principle of natural justice, *audi alteram partem*, which means giving at least a fair opportunity to present one`s case by hearing the other party, is not overlooked whilst justice is secured. Of course each case is individually unique on its own given the situation it is a very delicate and intriguing puzzle to solve that may not always convene to the expectations of each and every one.

Many people await the fate of the caseload 002/2 in the ECCC. With its limiting resources especially the financial shortcomings that the tribunal is currently facing many questions are being raised. Why should the ECCC be expanding its limited resources to treat somebody who is alleged to be behind the mass killing of more than 1.7million people? In no contest the ECCC has been trying its best to bring satisfaction to the Cambodian people who have been constantly seeking justice but at the same time, it has to make sure that the verdict to be delivered and measures to be taken in regards to the case 002/2, shall comply with the regulations of the laws, which also includes protecting the rights of the accused.

Since the establishment and operation of the ECCC, the legal system of Cambodia has definitely been boosted and there would not be a greater opportunity to further consolidate it and demonstrate its reliability than allowing it to handle the responsibility of the Ieng Thirith, had the ECCC can cease her detention as it awaits her improvement and thus can carry on with the other caseloads in the meantime for the convenience of the tribunal and can appease the growing impatience of everyone awaiting justice to be made.

We cannot ignore the fact that one of the basics of law practice is to apply the approach and jurisprudence adopted in previous cases dealing with similar situations. As its jurisdictions dictate, the ECCC has been very consistent in every single approach till now and has addressed the issue regarding the fitness to stand trial in a very pacific and professional method worthy of appraisal. But considering the age of the high profile accused and the vulnerability of the health of the accused, practical mechanisms should be devised in such a way that the time allowed for the accused to recover and proceedings to be continued, shall not start to make room for the shadow of leniency and incompetency to linger over the merits and credibility of the tribunal. We ultimately thrive for justice to prevail, but in this particular case, whether the right verdict will be pronounced or would history be repeated by dropping charges following the natural demise of the accused, only time will tell.